STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Whitbeck, C.J., and Griffin and Borrello, JJ.)

DIANE WILSON and PAUL WILSON,

Plaintiffs/Appellees,

v

Supreme Court No: 126951
Court of Appeals No: 243357
Lower Court No.: 98-2781-NO

ALPENA COUNTY ROAD COMMISSION,

Defendant/Appellant.

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APPELLEE'S BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

Respectfully submitted,

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INTRODUCTION

Plaintiff Diane Wilson was injured while riding her bicycle on a road covered with potholes or patches covering potholes. Defendant Alpena County Road Commission had "chip sealed" the road in 1968, and had failed to reseal the road every five to seven years, which was the routine maintenance needed to prevent deterioration of the roadway. Defendant's utter failure to perform this routine maintenance had led to significant deterioration of the roadway surface—a dangerous condition that caused Plaintiff's injury. Yet the trial court, Alpena Circuit Judge Joseph Swallow, granted summary disposition to Defendant, ruling that the road now needed reconstruction, and that reconstruction is not encompassed in the statutory duty to maintain and repair.

The trial court's ruling essentially rewarded Defendant with immunity for its complete failure to maintain the road in reasonable repair.

The Court of Appeals correctly rejected this absurd proposition, holding that Plaintiffs presented evidence, sufficient to survive summary disposition, that Defendant breached its statutory duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel" when it allowed the highway to fall into such a state of disrepair that the roadway needed to be completely rebuilt. This Court should affirm the Court of Appeals decision.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. A County Road Commission is liable under the highway exception where it had actual or constructive knowledge of the defect and had reasonable time to repair it. Here, Defendant was aware of the deterioration of Monaghan Point Road and the need to reseal it for years before Plaintiff's injury. The Court of Appeals held that there was sufficient evidence to give rise to a question of fact regarding Defendant's knowledge, and reversed the trial court's grant of summary disposition. Was the Court of Appeals ruling correct?

Plaintiffs-Appellees answer, "Yes."
Defendant-Appellant answers, "No."

II. A County Road Commission has a duty to maintain a highway under its jurisdiction "in reasonable repair so that it is reasonably safe and convenient for public travel." Here, since 1968, Defendant failed to conduct the routine maintenance of periodically resealing Monaghan Point Road, resulting in the complete deterioration of the roadway surface such that the roadway now needs to be reconstructed. The Court of Appeals held that Defendant could not "escape liability simply by allowing a road to deteriorate to the point where the only economically feasible 'maintenance' is to reconstruct the entire roadway." Was the Court of Appeals ruling correct?

Plaintiffs-Appellees answer, "Yes."
Defendant-Appellant answers, "No."

III. Plaintiff was injured when her front bicycle tire struck a pothole, throwing her over the handlebars. The trial court granted summary disposition to Defendant on causation because Plaintiff could not identify the exact pothole that caused her fall, despite her testimony that she felt her handlebars go down as she was trying to avoid the several potholes on the road. The Court of Appeals held that a question of fact existed, and reversed the trial court's grant of summary disposition. Was the Court of Appeals ruling correct?

Plaintiffs-Appellees answer, "Yes.
Defendant-Appellant answers, "No."

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COUNTERSTATEMENT OF FACTS

On May 31, 1996, Plaintiff Diane Wilson[1] was riding her bicycle to work.[2] While riding on Monaghan Point Road, she was trying to avoid the many potholes on the road, when she felt her tire go into a pothole, and she flew over the top of her handlebars, sustaining multiple injuries.[3] Therefore, Plaintiff brought the instant action against Defendant Alpena County Road Commission for negligent road maintenance.

Monagahan Point Road was "chip sealed" in 1968.[4] The length of the roadway was only six-tenths of a mile.[5] Glenn McConnell, Defendant's operations administrator, testified that this type of road surface needed resurfacing every five to ten years.[6] He testified that since the time when he first began to work for Defendant in 1993, the road needed resurfacing or resealing.[7] Without resealing, moisture is allowed through the seal, resulting in potholes.[8] Resealing the road about every seven years would prevent deterioration of the road.[9]

However, the road was never resealed, even though resealing is "routine" maintenance, by Defendant's own admissions.[10] Instead, whenever it rained, potholes

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[1] Plaintiff Paul Wilson is the husband of Diane Wilson, and he asserted a claim for loss of consortium. However, because his claim is derivative in nature, for ease of reference this brief will refer to "Plaintiff" in the singular to refer to Plaintiff Diane Wilson.
[2] Appellant's Appendix 121a-122a (Diane Wilson Deposition, 11/11/98, pp 9-10).
[3] Appellant's Appendix, 127a-129a (Diane Wilson Deposition, pp 15-17).
[4] Appellant's Appendix, 226a-227a (Glenn McConnell Deposition, 5/6/99, pp 9-10).
[5] Appellant's Appendix, 234a (McConnell Deposition, p 38).
[6] Appellant's Appendix, 226a-227a (McConnell Deposition, pp 9-10).
[7] Appellant's Appendix, 227a (McConnell Deposition, p 11).
[8] *Id.*
[9] Appellant's Appendix, 242a (McConnell Deposition, pp 70-71).
[10] Appellant's Appendix, 236a (McConnell Deposition, p 46).

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would appear, and Defendant would simply apply a "cold patch" to the pothole by manually shoveling material into the pothole to fill it.[11] McConnell admitted that cold patches could last as little as a single day, depending on conditions.[12] He acknowledged that cold-patching was not adequate long-term maintenance of the road.[13] He also testified that, since at least early 1994, the road was so deteriorated that it was in need of being pulverized, reshaped and resurfaced or reconstructed.[14] The option of applying a routine resealing had been lost a long time ago.[15] The road needed to be replaced.[16]

The cold-patching was not only inadequate to maintain the road in reasonable repair, it actually contributed to the dangerous condition of the road. Defendant's own retained expert, Dr. William Taylor, testified that there were places on Monaghan Point Road where a series of pothole patches of varying heights covered the entire width of the roadway.[17] This is evident from the photographs of the road that are included in the appendix.[18] He testified that these patches contributed to surface discontinuity, which can cause a vehicle to lose control because the bumpy surface diminishes the ability to brake and steer.[19] He agreed that the surface of the road was rough to the extent that it

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[11] Appellant's Appendix, 228a, 229a-230a, 239a (McConnell Deposition, pp 14-15, 21-22, 59-60).
[12] Appellant's Appendix, 232a (McConnell Deposition, pp 30-31).
[13] Appellant's Appendix, 243a (McConnell Deposition, p 77).
[14] Appellant's Appendix, 234a (McConnell Deposition, pp 38-39).
[15] Appellant's Appendix, 236a (McConnell Deposition, pp 47-48).
[16] Appellee's Appendix, 40b (William Taylor Deposition, 1/31/00, p 14).
[17] Appellee's Appendix, 43b (Taylor Deposition, p 29).
[18] Appellee's Appendix, 1b-4b.
[19] Appellee's Appendix, 45b, 47b (Taylor Deposition, pp 37, 45).

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could affect the controllability of a bicycle.[20] The surface was so rough that Dr. Taylor concluded that, although the posted speed limit on Monaghan Point Road was 25 miles per hour, the road could not safely be negotiated at that speed.[21]

Larry Orcutt, an engineering aide with Defendant since 1987,[22] confirmed that seal-coating, or resealing, a road was a matter of routine maintenance.[23] A three-eighths inch layer of emulsified asphalt is sprayed onto the road surface with a tank and spray bar.[24] The purpose of applying a seal coat is to repair cracks and add longevity to a road.[25] Resealing therefore prevents cracks, which lead to moisture and the formation of potholes.[26]

Orcutt believed that a road like Monaghan Point Road should be resealed every five years; however, there had been no seal coating on Monaghan Point Road since 1968.[27] He agreed that the road was "in terrible condition."[28] Again, the photographs of the roadway illustrate this terrible condition Mr. Orcutt also admitted that a pothole patch could last as little as a single day, and that the lack of routine resealing maintenance on Monaghan Point Road had probably contributed to its current condition.[29] Indeed, by the early 1990s, Defendant had concluded that the road

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[20] Appellee's Appendix, 43b (Taylor Deposition, p 28).
[21] Appellee's Appendix, 48b (Taylor Deposition, pp 47-48).
[22] Appellee's Appendix, 12b (Larry Orcutt Deposition, 9/14/99, p 5).
[23] Appellee's Appendix, 14b (Orcutt Deposition, pp 10-11).
[24] *Id.*
[25] Appellee's Appendix, 14b (Orcutt Deposition, p 11).
[26] Appellee's Appendix, 14b (Orcutt Deposition, pp 11-12).
[27] Appellee's Appendix, 15b, 19b (Orcutt Deposition, p 17, 30, 33).
[28] Appellee's Appendix, 21b (Orcutt Deposition, p 41).
[29] Appellee's Appendix, 22b (Orcutt Deposition, p 44).

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needed to be reconstructed, due to the deterioration of the existing surface.[30]

In 1990, Defendant's engineer authored a memo to Defendant describing the improvement needs for the local roads.[31] The memo indicated that several roads had not been resealed for several years, and were in need of a reseal.[32] The memo also stated, "Some of these sealcoat surfaces have deteriorated beyond the point of being salvageable with a single reseal. They will need to be pulverized, reshaped and resurfaced or reconstructed."[33] Mr. Orcutt testified that, in 1990, Monaghan Point Road was included in the described roads that were deteriorated to that degree.[34] He testified that the need for complete reconstruction was the result of the failure to periodically reseal the road:

> Q. Sure. But at that point in time could Monaghan Point Road—did it deteriorate to the point where a reseal was impractical?
>
> A. In my opinion, yes.
>
> Q. And one of the reasons is because it hadn't been resealed earlier, true?
>
> A. Yes.
>
> Q. So if it had been resealed earlier, it may have been able to be salvaged back in 1989?
>
> A. It may have been, yes.[35]

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[30] Appellee's Appendix, 22b-23b (Orcutt Deposition, pp 45-46).
[31] Appellee's Appendix, 5b-10b (Memorandum, 3/5/90).
[32] Appellee's Appendix, 7b (Memo, p 3).
[33] *Id.*
[34] Appellee's Appendix, 26b (Orcutt Deposition, p 60).
[35] Appellee's Appendix, 26b (Orcutt Deposition, pp 60-61).

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Mr. Orcutt had determined in 1989 that Monaghan Point Road had not been resealed since 1968:

> Q. All right. And so back in 1989, you made a determination that the last time Monaghan Point Road had been sealed or resealed was before 1968?
>
> A. Yes.
>
> Q. All right. So it definitely didn't receive its routine maintenance of a reseal every five years or whatever, true?
>
> A. True.[36]

Indeed, Orcutt testified that, as far back as 1989, Monaghan Point Road was in a similarly poor condition to what it was at the present time.[37]

Defendant moved for summary disposition, arguing that since Defendant had applied cold patches to potholes on Monaghan Point Road twice in the thirty days before Plaintiff's accident, it had satisfied its duty to maintain and repair the roadway and that it had no notice of any pothole defect in the roadway.[38] Defendant also argued that, because Plaintiff could not identify a particular pothole that caused the accident, she could not prove causation.

Plaintiff stressed to the trial court that Defendant failed to reseal Monaghan Point Road every 5-7 years, which was a matter of routine maintenance. This utter failure to maintain had resulted in a complete deterioration of the roadway, such that now it was

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[36] Appellee's Appendix, 24b (Orcutt Deposition, pp 52-53).
[37] Appellee's Appendix, 24b-25b (Orcutt Deposition, p 53-54).
[38] See Appellant's Appendix, 230a (McConnell Deposition, pp 23-25), indicating that cold-patches were applied on 5/9/96 and 5/14/96. Ironically, the fact that cold patching

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in need of pulverization and reconstruction. Plaintiff also argued that the evidence clearly showed Defendant's actual knowledge of the road conditions for several years, and that she had presented sufficient evidence that the poor road condition caused her injury.

The trial court granted Defendant's motion for summary disposition. The trial court held that the only way to now alleviate the poor condition of Monaghan Point Road was to reconstruct it, which was beyond the statutory duty to maintain and repair.[39] The trial court also held that, since Defendant had applied cold patches to potholes twice in the month before Plaintiff's injury, Defendant had no actual or constructive knowledge of any defects on the roadway and could not be held liable.[40] The trial court also concluded that Plaintiff's injury could just have easily been caused by a punctured tire as by a pothole, so there was insufficient evidence of causation to survive summary disposition.[41] Therefore, the trial court granted summary disposition to Defendant.

Plaintiff appealed as of right, and the Court of Appeals reversed. The Court of Appeals rejected Defendant's argument that reconstructing the road was beyond its duty to repair and maintain, where the road's extreme state of disrepair was caused by Defendant's own failure to maintain the road by resealing it:

> We also reject the notion that because the statute does not require "rebuilding" or any specific method of maintenance,

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was performed twice in one month is a testament to its ineffectiveness.
[39] Appellant's Appendix, 14a (Circuit Court Opinion, p 5).
[40] Appellant's Appendix, 15a-16a (Circuit Court Opinion, pp 6-7).
[41] Appellant's Appendix, 16a-17a (Circuit Court Opinion, pp 7-8).

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> defendant can escape liability by allowing a road to deteriorate to a point where the only economically feasible "maintenance" is to reconstruct the entire roadway.[42]

The Court of Appeals also held that Plaintiff had presented sufficient evidence that Defendant was aware of the condition of the road prior to her injury, where Defendant knew that the road needed to be reconstructed in the early 1990s because it had never been resealed since 1968.[43] Finally, the Court of Appeals held that Plaintiff presented sufficient evidence of causation to survive a motion for summary disposition, where the roadway was replete with potholes and where Plaintiff felt her front tire go down into a pothole.[44] Thus, the Court reversed the trial court's grant of summary disposition, and remanded for further proceedings.[45] Defendant has now appealed to this Court. For the reasons set forth in this brief, this Court should affirm the Court of Appeals decision.

Further facts will be discussed as needed in the argument of the issues.

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[42] Appellant's Appendix, 22a (Court of Appeals Opinion, p 3).
[43] Appellant's Appendix, 23a (Court of Appeals Opinion, p 4).
[44] Appellant's Appendix, 20a, 24a-25a (Court of Appeals Opinion, pp 1, 5-6).
[45] Appellant's Appendix, 25a (Court of Appeals Opinion, p 6).

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ARGUMENT

I. A County Road Commission is liable under the highway exception where it had actual or constructive knowledge of the defect and had reasonable time to repair it. Here, Defendant was aware of the deterioration of Monaghan Point Road and the need to reseal it for years before Plaintiff's injury. The Court of Appeals held that there was sufficient evidence to give rise to a question of fact regarding Defendant's knowledge, and reversed the trial court's grant of summary disposition. The Court of Appeals ruling was correct.

Standard of Review: The Court of Appeals correctly noted that the standard of review is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998) [(C)(10)]; *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997) [(C)(8)]; *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992) [(C)(7)]. Additionally, all the documentary evidence should be viewed in the light most favorable to the nonmoving party, here, the plaintiff. *Michigan Ed Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000) [(C)(10)]; *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001) [(C)(7)].

Discussion: The Court of Appeals decision was correct. Defendant knew for several years before Plaintiff's injury that Monaghan Point Road was in poor condition with many potholes. Plaintiff sufficiently pleaded facts within the highway exception.

Under MCL 691.1403, liability under the highway exception requires that the governmental agency had actual or constructive knowledge of the defect. *VanStrien v Grand Rapids*, 200 Mich App 56, 58; 504 NW2d 13 (1993). The statute provides as follows:

> No governmental agency is liable for injuries or damage caused by defective highways unless the

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> governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place. [MCL 691.1403.]

Generally, this inquiry—whether the agency had actual or constructive knowledge of the defect—is a question of fact. *Cruz v Saginaw*, 370 Mich 476, 481; 122 NW2d 670 (1963). The Court of Appeals held that Plaintiff presented sufficient evidence to create a question of fact, precluding summary disposition to Defendant.[46] That ruling was correct.

Defendant argues that, since it applied cold patches to potholes on Monaghan Point Road twice in the thirty days preceding Plaintiff's injury, it was not on actual or constructive notice that there was a pothole. However, Defendant's own employees testified that a cold patch could last as little as a single day. Indeed, the fact that it was done twice in one month demonstrates its ineffectiveness.

In any event, the "defect" was not simply the presence of a particular pothole, but the deteriorated state of the surface of the roadway. There were so many patches that they covered the entire width of the roadway in places, creating a surface discontinuity that itself contributed to the dangerous condition of the road. But most importantly, the crucial breach in this case was Defendant's failure to reseal the road since it was chip-sealed in 1968, when Defendant's own witnesses testified that resealing was needed

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every five to seven years to prevent moisture from penetrating cracks and creating potholes.

Defendant was on actual notice of the multiple potholes and bumpy patches, caused by its failure to perform the routine maintenance of resealing the road. Defendant had knowledge of the deteriorated and dangerous condition of the surface of the roadway. Defendant's operations administrator testified that, since 1993 when he first began to work for Defendant, the road needed resealing.[47] Since at least 1994, the road was in such disrepair that it needed to be pulverized, reshaped, and reconstructed.[48] Defendant's engineering aide testified that, by about 1990, it was apparent that the failure to reseal the road had resulted in its deterioration to the extent that reconstruction was needed.[49] If Defendant had resealed the road earlier—which was a matter of "routine" maintenance, according to Defendant's employees[50]—it may have been salvaged even as late as 1989.[51]

Thus, Defendant knew that Monaghan Point Road needed the routine resealing every five to seven years. Defendant also knew that this routine maintenance was never performed since 1968. By the early 1990s, Defendant knew that this failure to reseal the road had led to its deterioration to the point that reconstruction was needed. For Defendant to argue that it lacked knowledge of the dangerous condition of the

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[46] Appellant's Appendix, 23a-24a (Court of Appeals Opinion, pp 4-5).
[47] Appellant's Appendix, 227a (McConnell Deposition, p 11).
[48] Appellant's Appendix, 234a (McConnell Deposition, pp 38-39).
[49] Appellee's Appendix, 22b-23b, 26b (Orcutt Deposition, pp 45-46, 60-61).
[50] Appellee's Appendix, 14b (Orcutt Deposition, pp 10-11); Appellant's Appendix, 236a (McConnell Deposition, p 46).

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roadway's surface is disingenuous. In *Peters v Dep't of State Highways*, 400 Mich 50, 52-53; 252 NW2d 799 (1977), a person was injured from an automobile accident resulting from standing water pooled on the roadway. This Court ruled that the defendant knew of this defect, even if it did not know that water was pooled on the roadway on that precise day. *Id.*, 59-60. The record demonstrated that the defendant "knew that ponding sometimes occurred at this site in question well before the time of this accident." *Id.*, 59. That evidence was sufficient to survive the defendant's motion for summary disposition. *Id.*, 60-61.

Likewise, Defendant in this case knew that potholes regularly developed on Monaghan Point Road, due to the fact that moisture penetrated the sealcoat, since no resealing had ever been performed since 1968. Defendant also knew that a cold patch might last only a single day, and was an ineffective maintenance measure—in other words, a negligent undertaking of maintenance. Thus, it was certainly foreseeable to Defendant that the potholes would continue to reappear—often, the following day. The defective condition of the road was known to Defendant for years before Plaintiff's injury.

As the Court of Appeals concluded, "The evidence put forth by plaintiffs in this case, outlined above, was amply sufficient to give rise to a question of fact regarding defendant's actual or constructive knowledge. Defendant's argument to the contrary is unfounded."[52] This Court should affirm the Court of Appeals.

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[51] Appellee's Appendix, 26b (Orcutt Deposition, pp 60-61).
[52] Appellant's Appendix, 24a (Court of Appeals Opinion, p 5).

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II. A County Road Commission has a duty to maintain a highway under its jurisdiction "in reasonable repair so that it is reasonably safe and convenient for public travel." Here, since 1968, Defendant failed to conduct the routine maintenance of periodically resealing Monaghan Point Road, resulting in the complete deterioration of the roadway surface such that the roadway now needs to be reconstructed. The Court of Appeals held that Defendant could not "escape liability simply by allowing a road to deteriorate to the point where the only economically feasible 'maintenance' is to reconstruct the entire roadway." The Court of Appeals ruling was correct.

Standard of Review: The Court of Appeals correctly noted that the standard of review is de novo. *Spiek, supra* at 337 [(C)(10)]; *Beaty, supra* at 253 [(C)(8)]; *Wade, supra* at 162 [(C)(7)]. Additionally, all the documentary evidence should be viewed in the light most favorable to the nonmoving party, here, the plaintiff. *MEEMIC, supra* at 114 [(C)(10)]; *Brennan, supra* at 157 [(C)(7)].

Discussion: The Court of Appeals decision was correct. Plaintiff sufficiently pleaded and proved facts to bring her claim within the highway exception to governmental immunity. Defendant cannot claim that it has kept the road in reasonable repair so that it is reasonably safe for public travel, where it has allowed the condition of the roadway to deteriorate over the years to such an extent that now, complete reconstruction of the road is needed.

Plaintiff sufficiently pleaded facts to state a claim under the "highway exception":

In this Court's order granting Defendant's application for leave to appeal, the Court directed the parties to specifically brief the issue "whether the plaintiffs sufficiently

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pleaded facts and provided evidence sufficient to place their claim within the highway exception to governmental immunity." *Wilson v Alpena Co Rd Comm*, 472 Mich 899; 698 NW2d 390 (2005). Plaintiff did indeed plead and prove a claim within the "highway exception."

This case involves the "highway exception" to the general governmental immunity statute, MCL 691.1407(1). The highway exception is stated at MCL 691.1402(1), in pertinent part as follows (emphasis added):

> Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway **shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel**. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.

MCL 224.21, in turn, provides that "a county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel."

Plaintiff stated a claim under the highway exception to governmental immunity. Specifically, Plaintiff's complaint alleged the following facts:

> 3. That on 5-31-96, Plaintiff, Diane Wilson, was riding her mountain bicycle on Monaghan Pointe Road, approximately one-half mile from the intersection of

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US 23 in the County of Alpena, State of Michigan.

4. That at said date and place, Plaintiff, Diane Wilson's, bicycle went over a pothole in Monaghan Pt. Rd. causing her tire to pop, resulting in her going over her handlebars, striking her head on the pavement.

5. That as a result of said accident, Plaintiff sustained severe and permanent injuries described elsewhere in this Complaint.

6. That on said date, the Defendant had a duty to maintain Monaghan Pt. Rd. in a reasonably safe condition for public travel.

7. That Plaintiff's accident was proximately caused by the negligence of the Defendant, said negligence consisting of the following:

   a. Defendant failed to properly maintain Monaghan Pt. Rd. so as to be safe for vehicular travel;

   b. Failure to repair potholes which, at the location of the accident, were in excess of six inches deep;

   c. Monaghan Pt. Rd. was in a condition that was dangerous to vehicular travel but the Defendant failed to repair and maintain it;

   d. The potholes/ruts/holes in Monaghan Pt. Rd. had existed in excess of thirty days;

   e. Defendant failed to take necessary measures to correct/repair the ruts/potholes/holes which existed on Monaghan Pt. Rd. in the area where this accident occurred.

8. That Plaintiff's accident was caused by the Defendant's violation of MCL 691.1402.[53]

[53] Appellant's Appendix, 27a-28a (Complaint).

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Thus, Plaintiff alleged that she was injured when her bicycle tire went into a pothole on Monaghan Point Road, in Defendant's jurisdiction, causing her to be thrown over the handlebars and sustain a head injury.[54] Plaintiff also alleged that Defendant failed to maintain the road so that it was reasonably safe for travel and that the road "was in a condition that was dangerous to vehicular travel."[55] This was sufficient to plead a claim under the highway exception, given Michigan's "notice-pleading" requirements. "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993).

These facts were sufficient to plead a claim within the highway exception. In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 172; 615 NW2d 702 (2000), this Court held that the plaintiff had pleaded in avoidance of governmental immunity "[b]y alleging that she was injured by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel . . . ." This Court noted that the plaintiff would also be required to prove the traditional elements of a negligence; i.e., a breach of duty that proximately causes harm. *Id.*, n 29. Likewise, Plaintiff in the instant case sufficiently pleaded in avoidance of governmental immunity when she alleged that she was injured by "a condition that was dangerous to vehicular travel" on the "pavement" of the roadway.

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[54] Appellant's Appendix, 27a (Complaint, ¶¶ 2-5).

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Defendant argues that Plaintiff initially pled only a "pothole" claim and later changed it to reflect a claim for the generally deteriorated state of the roadway. This is not true. Plaintiff's complaint alleged that "Defendant failed to properly maintain Monaghan Pt. Rd. so as to be safe for vehicular travel," and that the road "was in a condition that was dangerous to vehicular travel but the Defendant failed to repair and maintain it."[56] Plaintiff's complaint referred to "the potholes/ruts/holes" on the road, which is an accurate description of the generally deteriorated state of the roadway, as clearly seen in the photographs of the road.[57]

Thus, Plaintiff did in fact plead in avoidance of governmental immunity.

Defendant breached its duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel":

MCL 691.1402(1) imposed a duty on Defendant to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." Defendant argues that it satisfied this duty by applying cold patches to potholes as they appeared on the roadway, and that the only way to eliminate the pothole problem is to reconstruct the entire roadway, which it asserts is beyond the scope of the duty to "maintain the highway in reasonable repair." **However, Defendant's argument misses the crucial point of this case—that it was a matter of routine maintenance to apply a reseal to the road every five to seven years to prevent the formation of**

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[55] Appellant's Appendix, 27a-28a (Complaint, ¶ 7a-e).
[56] *Id.*

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potholes, yet Defendant failed to perform this routine maintenance. As a result of that utter failure to maintain the surface of the roadway, multiple potholes formed, causing a complete destruction of the surface of the roadway.

Thus, Defendant allowed the roadway to deteriorate to the point where complete reconstruction is needed. The issue is not whether the duty to maintain and repair includes a duty to rebuild—it is whether a road commission should be immune from liability where it has failed to maintain and repair a road to such a grievous extent that the road is completely deteriorated. Defendant is seeking to be rewarded with immunity for its breach of the duty to maintain the highway in reasonable repair.

Defendant's own employees attested to its complete failure to satisfy its duty of maintenance. The operations administrator, Glenn McConnell, testified that Monaghan Point Road was sealed in 1968 and that it needed to have another seal coat applied about every seven years in order to prevent deterioration of the roadway surface.[58] This type of resealing was considered the "routine maintenance" needed for that road.[59] Defendant, by choosing the type of roadway to construct, also defined the type of maintenance that was required.

Without a properly maintained sealcoat, cracks develop in the roadway surface, allowing moisture to penetrate it, which eventually leads to potholes.[60] Larry Orcutt, Defendant's engineering aide since 1987, confirmed that resealing the road would have

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[57] Appellee's Appendix, 1b-4b.
[58] Appellant's Appendix, 226a-227a, 242a (McConnell Deposition, pp 9-10, 70-71).
[59] Appellant's Appendix, 236a (McConnell Deposition, p 46).
[60] Appellant's Appendix, 227a (McConnell Deposition, p 11).

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been a matter of routine maintenance to prevent cracks, leading to moisture and potholes.[61] He believed that the road should be resealed about every five years.[62]

Yet Monaghan Point Road was never resealed since 1968.[63] By about 1990, Defendant realized that the roadway surface had deteriorated to the point that a single sealcoat would probably be insufficient to correct the problem.[64] Instead, the road needed to be pulverized, reshaped, and reconstructed or resurfaced.[65] If the road had been periodically resealed, it would not have deteriorated to such an extreme point.[66]

Defendant therefore failed to periodically reseal Monaghan Point Road, which led to a deterioration of the roadway surface due to moisture penetrating cracks in the seal and causing potholes. Defendant's response was to let the road deteriorate to the point of requiring reconstruction. The only effort at "repair" made by Defendant was to apply a cold patch to potholes as they developed. But a patch was simply a shovel-full of material manually placed into the pothole, which could last as briefly as a single day.[67] Defendant's operations administrator even acknowledged that cold-patching was an inadequate method of maintaining the road over the long term.[68]

Moreover, Defendant's own retained expert admitted that the cold patches themselves can contribute to the surface discontinuity, which affects the ability to brake

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[61] Appellee's Appendix, 12b, 14b (Orcutt Deposition, p 5, 10-12).
[62] Appellee's Appendix, 19b (Orcutt Deposition, p 30).
[63] Appellee's Appendix, 19b (Orcutt Deposition, p 33).
[64] Appellee's Appendix, 26b (Orcutt Deposition, pp 60-61).
[65] Appellee's Appendix, 7b (Memo, p 3).
[66] Appellee's Appendix, 26b (Orcutt Deposition, pp 60-61).
[67] Appellant's Appendix, 232a (McConnell Deposition, pp 30-31); Appellee's Appendix, 22b (Orcutt Deposition, p 44).

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or steer a vehicle:[69]

> Q. Right. In fact, that bumpy, rough area diminishes the ability to brake, doesn't it?
>
> A. It does.
>
> Q. And it also diminishes the ability to steer, doesn't it?
>
> A. Yes, it does.
>
> Q. All right. And all those can make a road unreasonably safe for public travel for a bicycle; isn't that true?
>
> A. At a certain speed, yes.[70]
>
> * * *
>
> Q. And so, therefore, wouldn't the patches contribute to that surface discontinuity?
>
> A. Sure.
>
> Q. That can cause a vehicle to lose control?
>
> A. It's possible, yes.[71]

Indeed, there were so many patches on Monaghan Point Road that at some points, they covered the entire width of the roadway, in varying heights, such that there were areas where a person could not avoid a patch or a pothole.[72]

The sorry state of Monaghan Road is vividly depicted in several photographs, which were submitted to the trial court in support of Plaintiff's pleadings and which are

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[68] Appellant's Appendix, 243a (McConnell Deposition, p 77).
[69] Appellee's Appendix, 44b, 45b, 47b (Taylor Deposition, pp 32, 37, 45).
[70] Appellee's Appendix, 45b (Taylor Deposition, p 37).
[71] Appellee's Appendix, 47b (Taylor Deposition, p 45).

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included in the appendix.[73] Defendant's claim to have "maintain[ed] the highway in reasonable repair so that it is reasonably safe and convenient for public travel" is belied by the testimony of its own witnesses and by the physical reality on the roadway.

Defendant cites this Court's decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000) as the central case supporting its position. But Defendant's reliance is misplaced. In *Nawrocki*, this Court held that "the highway exception applies when a plaintiff's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel." *Id.*, 151. This Court explained the duty under the highway exception as follows:

> The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: "[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." This sentence establishes the duty to keep the highway in reasonable repair. The phrase "so that it is reasonably safe and convenient for public travel" refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." [*Id.*, 160.]

Thus, liability does not attach solely because a road is not reasonably safe. But a defendant is liable where the unsafe road condition is caused by the defendant's failure to satisfy the duty to maintain the road in reasonable repair. Here, the deteriorated and dangerous condition of the roadway directly resulted from Defendant's

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[72] Appellee's Appendix, 40b, 43b (Taylor Deposition, pp 17, 28-29).

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failure to perform routine maintenance.

Defendant argues that, since it had no duty to keep the highway reasonably safe for public travel, it is immune from scrutiny and liability regarding its decision to apply cold patches to the potholes. Defendant is wrong. The statutory duty is to **reasonably** maintain the highway, in a manner that leads to a highway that is "reasonably safe and convenient for public travel." Thus, a governmental agency is not free to choose an unreasonable course of action that leads to a dangerous road condition.

In this case, Defendant knew that resealing the road every five to seven years would prevent cracks in the surface, which would prevent moisture from causing dangerous potholes. Resealing the road was a matter of routine maintenance. Yet Defendant never conducted this maintenance and repair. Instead, it simply applied cold patches to the potholes, a method which was not only inadequate, but actually contributed to the dangerous condition of the roadway due to the sheer number of the patches. Defendant's own employees testified that the road had deteriorated due to Defendant's failure to reseal it. This was not reasonable maintenance and repair.

Defendant relies on language from this Court's opinion in *Nawrocki*, *supra* at 179, indicating that the choice of methods of maintaining a road is best left to the governmental agency, and not the courts. However, the full context of that language is instructive. The Court was addressing a claim that improper signage fell within the highway exception:

> There is potentially no end to the creative and innovative

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[73] Appellee's Appendix, 1b-4b.

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> theories that can be raised in support of the proposition that a highway accident, occurring upon even the most unremarkable thoroughfare, was, in fact, the result of inadequate or imperfect signage. Courts possess no greater insight than the state or county road commissions into matters involving traffic control devices, such as traffic signs. Maintenance of an appropriate deference for, and application of, the public policy choices made by the Legislature, as reflected in the plain language of the statutory highway exception, ensures that determinations regarding how best to allocate limited public highway funds are left to the proper authorities.

Thus, whether to install traffic signs, and which signs to install, are not matters for the Courts to address under the highway exception. As for general highway maintenance and repairs, although the governmental agency may choose how best to repair and maintain a roadway, see *Canton Twp v Wayne Co Rd Comm*, 141 Mich App 322, 328; 367 NW2d 385 (1985) (denying mandamus to direct specific method of maintenance because the methods of maintenance are a matter of discretion), it must choose an option that satisfies its duty to maintain the highway in "reasonable repair." Under the statute, the maintenance and repair efforts made on the improved portion of the highway must be "reasonable", which will always require an inquiry into the reasonableness of those efforts. Defendant may not choose an unreasonable or unsafe method of "repair."

That duty imposes an obligation to take active steps to perform maintenance and repair work as necessary. In *Jones v Enertel, Inc*, 467 Mich 266, 268-269; 650 NW2d 334 (2002), this Court held that the open-and-obvious doctrine does not shield

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governmental agencies under the highway exception, since the statute imposes a duty to maintain the highway (or, in the case of *Jones*, a sidewalk) "in reasonable repair." "This means that municipalities have an obligation, if necessary, to actively perform repair work to keep such sidewalks in reasonable repair." *Id.*, 268. And this Court has relied on dictionary definitions of "maintain" and "repair," as follows:

> The statute further provides that the specific duty of the state and county road commissions is to "*repair and maintain*" highways. "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." *Webster's Third New International Dictionary*, Unabridged Edition (1966), p. 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." *Random House Webster's College Dictionary* (2000), p. 1119. [*Hanson v Mecosta Co Rd Comm*, 465 Mich 492, 502; 638 NW2d 396 (2002).]

Thus, Defendant had an active duty to preserve the roadway. Defendant's own employees testified that periodic resealing was the method needed to preserve this type of road. By selecting the type of road to install, Defendant also defined what type of maintenance and repair were required. But Defendant failed to reseal the roadway in nearly three decades, resulting in its complete deterioration. Further, by applying "cold patches" that might last only a single day, which themselves contribute to the dangerous condition of the road, Defendant did not fulfill its duty to maintain Monaghan Point Road in reasonable repair.

Defendant's argument would eviscerate the highway exception. Defendant's interpretation of the statute is that any effort at maintenance, no matter how inadequate

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and no matter how dangerous it leaves the roadway, will satisfy the duty of maintenance and repair. This would extend immunity where the Legislature clearly did not intend it. Where a governmental agency fails to maintain a highway in **reasonable** repair, in such a manner that it is reasonably safe for public travel, that agency is not immune from liability.

Defendant argues to this Court that the Court of Appeals decision will require road commissions throughout the state to rebuild old roads anytime there are potholes. This is not true. The breach in this case is not the failure to rebuild a road—it is the failure to reseal the road—**ever**—when such resealing is the routine maintenance needed every five to seven years to prevent deterioration of the roadway surface. Instead of performing the necessary routine maintenance, Defendant applied so many cold patches to such a short stretch of road that the potholes and patches cover the entire width in places, such that it is impossible to avoid either a pothole or a patch. Defendant has allowed Monaghan Point Road to deteriorate to an unsafe condition, as depicted in the photographs and as supported by the record. **Defendant may not avoid its statutory duty by ignoring it**. The Court of Appeals correctly resolved this issue, ruling as follows:

> We also reject the notion that because the statute does not require "rebuilding" or any specific method of maintenance, defendant can escape liability simply by allowing a road to deteriorate to a point where the only economically feasible "maintenance" is to reconstruct the entire roadway.
>
> * * *

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> Because defendant allowed the roadway to fall into such disrepair that it needed to be completely rebuilt, we find that plaintiff presented sufficient evidence that defendant breached its statutory duty to maintain a highway in reasonable repair so that it was reasonably safe and convenient for public travel.[74]

The Court of Appeals opinion does not require road commissions to rebuild all old roads with a pothole. It simply alerts road commissions that they may not allow a road to deteriorate to such an extremely poor condition that rebuilding it is the only way to fix it, only then to argue that they are immune from liability for an injury that occurs from their breach of the duty to maintain the highway in reasonable repair. A road commission should not be rewarded with immunity for its total failure to maintain a roadway in reasonable repair, simply because that roadway is now beyond repair. This Court should affirm the Court of Appeals.

[74] Appellant's Appendix, 22a-23a (Court of Appeals Opinion, pp 3, 4).

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III. Plaintiff was injured when her front bicycle tire struck a pothole, throwing her over the handlebars. The trial court granted summary disposition to Defendant on causation because Plaintiff could not identify the exact pothole that caused her fall, despite her testimony that she felt her handlebars go down as she was trying to avoid the several potholes on the road. The Court of Appeals held that a question of fact existed, and reversed the trial court's grant of summary disposition. The Court of Appeals ruling was correct.

Standard of Review: The Court of Appeals correctly noted that the standard of review is de novo. *Spiek, supra* at 337 [(C)(10)]; *Beaty, supra* at 253 [(C)(8)]; *Wade, supra* at 162 [(C)(7)]. Additionally, all the documentary evidence should be viewed in the light most favorable to the nonmoving party, here, the plaintiff. *MEEMIC, supra* at 114 [(C)(10)]; *Brennan, supra* at 157 [(C)(7)].

Discussion: The Court of Appeals decision was correct. Plaintiff presented sufficient evidence that her injuries were caused by her front bicycle tire going into a pothole, and the trial court erred by granting summary disposition to Defendant.

Plaintiff testified about her accident as follows:

> A. And proceeded to ride my bike and was snaking through the potholes. And the next thing I knew, I went over my handlebars.
>
> Q. Okay. Did you feel the bike hit anything, or you're just—
>
> A. A pothole.
>
> Q. —suddenly flying?
>
> A. I felt—**the front tire went into a pothole**, and I went over my handlebars.

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Q. Did you see the front tire go into a pothole?

A. No, I did not.

Q. What do you base your statement on, that it hit a pothole, if you didn't see it do it?

A. Because I was avoiding another pothole. And, like, the road has got so many potholes, avoiding the one I didn't see the other one. And my tire went in and it punctured the tire, and I went over my handlebars.[75]

She testified that she felt her tire going down into a hole, and felt her handlebars going down, when she was thrown over the top of the handlebars.[76]

Defendant argues that this was insufficient to create a question of fact regarding the element of causation, since Plaintiff could not identify the precise pothole that caused her accident. The trial court agreed, and held that since Plaintiff did not see the pothole, and since a punctured tire could have caused the fall, summary disposition in favor of Defendant was appropriate.[77] But the trial court failed to view the evidence in the light most favorable to the non-moving party. Plaintiff presented evidence sufficient to create a question of fact regarding causation.

In *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), this Court held that a plaintiff must provide more than mere conjecture or speculation to establish the causation element of a negligence claim. However, a plaintiff need not disprove other plausible theories of the injury. *Id.*, 160. A plaintiff must present "substantial

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[75] Appellant's Appendix, 127a-128a (Wilson Deposition, pp 15-16) (emphasis added).
[76] Appellant's Appendix, 128a-129a (Wilson Deposition, pp 16-17).

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evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.*, 164-165.

In this case, Plaintiff did present such evidence. Plaintiff's testimony establishes that, while trying to avoid potholes on Monaghan Point Road, she felt her tire go into a pothole, felt her handlebars go down, and was thrown over the top of the handlebars. The trial court's statement that a punctured tire could have caused the accident ignores the fact that the bicycle tire and handlebars went downward, into a hole. The road was so filled with potholes and patches that the surface was rough, with varying heights.[78] Dr. Taylor, Defendant's retained expert, admitted that there were sections of the road where it was impossible to avoid a patch or a pothole.[79] Plaintiff testified that she was "snaking" through the potholes on the road, trying to avoid them.[80]

This evidence was more than mere conjecture. "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id.*, 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). Here, Plaintiff's own testimony provided more than mere conjecture. In *Kenkel v The Stanley Works*, 256 Mich App 548, 560; 665 NW2d 490 (2003), the plaintiff testified that when she walked through automatic doors at a retail store, the doors closed on her, then suddenly retracted, causing her to fall to the ground. The Court of Appeals held that "the plaintiff's testimony was sufficient to

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[77] Appellant's Appendix, 16a-17a (Circuit Court Opinion, pp 7-8).
[78] Appellee's Appendix, 41b (Taylor Deposition, p 19).
[79] Appellee's Appendix, 40b (Taylor Deposition, p 17).
[80] Appellant's Appendix, 127a (Wilson Deposition, p 15).

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establish causation." *Id.* Likewise, Plaintiff testified that she was riding her bicycle on the roadway, "snaking" through the many potholes trying to avoid them, when she felt her front tire go down into a pothole, at which point she flew over the top of the handlebars. Her testimony was sufficient to establish causation.

The Court of Appeals correctly ruled that this evidence was more than mere conjecture that Plaintiff's accident was caused by her front bicycle tire going into a pothole. This Court should affirm that decision.

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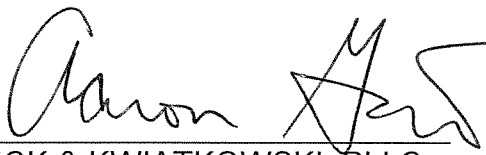
RELIEF REQUESTED

The Court of Appeals correctly reversed the trial court in this case. Plaintiff sufficiently pleaded a claim under the highway exception to governmental immunity. Defendant, through its failure to maintain the road, allowed the formation of multiple potholes and a complete deterioration of the road surface. Defendant's own employees admitted that the road needed resealing every five to seven years, which was a matter of routine maintenance that was never done since 1968. Defendant owed a statutory duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Defendant's breach of this duty was so extreme that it has essentially destroyed the road. Defendant should not be rewarded with immunity simply because its failure to maintain and repair was so complete and thorough that reconstruction of the road is now needed. Additionally, the evidence showed that Defendant had knowledge of the defective and dangerous condition of the road for a substantial period of time before Plaintiff's injury. Moreover, Plaintiff presented sufficient evidence of causation to survive a motion for summary disposition.

The Court of Appeals ruling was correct on all points. Therefore, Plaintiffs respectfully request that this Honorable Court AFFIRM the Court of Appeals decision.

Dated: August 10, 2005

Respectfully submitted,



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